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APPELLANT'S BRIEF

3808

SUPREME COURT OF KENTUCKY

No. 76-277

ROBERT (BOBBY GENE) SMITHER and
C. W. MADDOX - - - - - - - Appellants

versus

COMMONWEALTH OF KENTUCKY - - Appellee

APPEAL FROM HENRY CIRCUIT COURT
HON. GEORGE F. WILLIAMSON, JUDGE

BRIEF FOR APPELLANTS

FILED
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SUPREME COURT

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This is to certify that copies of the within brief have been served on the adverse parties by mailing same to: Hon. Carl Miller, Assistant Deputy Attorney General, Office of the Attorney General, Capitol Building, Frankfort, Kentucky 40601; Hon. Bruce R. Hamilton, Commonwealth Attorney, Courthouse, LaGrange, Kentucky 40031; and, upon the Trial Judge, Hon. George F. Williamson, Courthouse, LaGrange, Kentucky 40031, pursuant to RAP 1.250.

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SUPREME COURT OF KENTUCKY

No. 76-277

ROBERT (BOBBY GENE) SMITHER and
C. W. MADDOX - - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

APPEAL FROM HENRY CIRCUIT COURT
HON. GEORGE F. WILLIAMSON, JUDGE

BRIEF FOR APPELLANTS

May it please the Court:

STATEMENT OF THE CASE

(a) Nature of Proceeding.*

This is an appeal from the arson convictions of Robert (Bobby Gene) Smither and C. W. Maddox resulting from a jury trial held on November 5, 6 and 7, 1975, in the Henry Circuit Court at New Castle, Kentucky. Each appellant was charged on three indictments for commission of a fire in the city of Eminence, Kentucky, on December 23, 1974, and each was found

*Footnote references throughout this subsection pertain to the six indictment packets containing the record of the orders, motions and proceedings under each indictment.

guilty on all charges and was given a total of twenty years at hard labor.[1]

The statutes in effect at the date of the event under which appellants were indicted, KRS 433.010 and KRS 433.020, are set forth in the appendix to this brief (App., p. 1).

During the trial appellants made timely motions to dismiss the case of the Commonwealth (Tr. 341 & 626). On November 12, 1975, appellants, through counsel, filed a motion for a new trial which was responded to by the Commonwealth.[2] After a hearing on November 18, 1975, the motion of appellants was overruled by an order of the Henry Circuit Court, and the Court on November 18, 1975, proceeded to render final judgments and sentences in accordance with the verdicts, which judgments were entered on November 20, 1975.[3] From the judgments appellants filed a Notice of Appeal on November 20, 1975.[4]

On December 1, 1975, a motion was filed by appellants to reduce bail and to set reasonable bail on appeal.[5] After hearing testimony from twenty witnesses at a hearing on December 11, 1975, the Court entered an order of January 12, 1976, denying the motion of appellants, retaining the bond at $75,000.00 on appellant Bobby Gene Smither and $99,000.00 on appellant C. W. Maddox.[6] From this latter order appellants filed a Notice of Appeal on January 17, 1976.[7]

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[1]Ind. packets. pp. 5, 5, 5, 5, 5 & 5.
[2]Ind. packets. pp. 45 & 48, 37 & 40, 38 & 41, 23 & 26, 43 & 46 and 22 & 25.
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[4]Ind. packets. pp. 60, 52, 53, 39, 59 & 41.
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(b) Facts.

At the time of this writing appellants, C. W. Maddox and Robert (Bobby Gene) Smither, are in the penitentiary at LaGrange, Kentucky, serving twenty year sentences.

Early in the morning of December 23, 1974, at about 12:50 a. m., a fire occurred in the heart of Eminence, Henry County, Kentucky (Tr. 116 & 123). Burned were three contiguous buildings one of which housed the Odd Fellows Lodge and Chat'n'Nibble Restaurant, another the Eminence City Jail and Police Headquarters with an upstairs dwelling rented by the city to David Bright, and the third building, the Western Auto Store (See photo, Pl. Exhibit No. 1).

Appellant, C. W. Maddox, was the first to be indicted for the fire. On January 20, 1975, three separate arson indictments were returned by the Henry County Grand Jury against Maddox: Indictment No. 5-CR-75 under KRS 433.020 for the burning of the Lodge and restaurant; Indictment No. 6-CR-75 under KRS 433.010 for the burning of the City Jail, Police Headquarters and apartment and dwelling of David Bright; and, Indictment No. 7-CR-75 under KRS 433.020 for the burning of the Western Auto Store.

Months later, in October, 1975, the Henry County Grand Jury returned similar indictments against the other appellant, Robert Smither, to-wit: Indictment No. 113-CR-75; Indictment No. 114-CR-75; and, Indictment No. 115-CR-75.

Both appellants were tried together on all indictments at the three-day jury trial which began on November 5, 1975, and both were found guilty under each of their respective indictments. On the basis of the verdicts the Henry Circuit Court, on November 18, 1975, adjudicated guilt and fixed sentences as follows:

Maddox: Indictment No. 5-CR-75—five years hard labor.

Indictment No. 6-CR-75—ten years hard labor to run consecutive to the five years under Indictment No. 5-CR-75.

Indictment No. 7-CR-75—five years hard labor, to run consecutive to the ten year sentence under Indictment No. 6-CR-75.

Smither: Indictment No. 113-CR-75—five years hard labor.

Indictment No. 114-CR-75—ten years hard labor.

Indictment No. 115-CR-75—five years hard labor, all to run consecutively.

Therefore, a total of twenty years was accumulated for each appellant. The undersigned privately-retained attorneys represented both appellants at trial, although appellant, C. W. Maddox, was represented by private counsel John Berry, Jr., in the early stages of his defense, including his arraignment in January, 1975.

The trial of the case involved nineteen witnesses, ten for the Commonwealth and nine for the defense (including defendants), although one Commonwealth witness—Chief of Police, Vernon Rucker, was also called by defendants. There were numerous exhibits.

From the voluminous trial transcript the following facts evolve:

It was the contention of the Commonwealth at trial that two men, the appellants, came into City Hall on the early morning in issue and started the fire, destroying the newly-constructed office and radio room of Police Chief Vernon Rucker as well as the upstairs apartment and adjacent buildings (Tr. 2 & 3).

The City Hall and Police Headquarters were located in the center of the two other buildings destroyed in the fire, and the dwelling of David and Pamela Bright was located above the Police Headquarters spaces. The restaurant property, the police station, and the Western Auto Store were not separated by alleys, only walls (Pl. Exhibit No. 1).

Thomas Lee Peterson was a City Police Officer on duty on the morning of December 23, 1974 (Tr. 106). He fixed the time of the occurrence. Mr. Peterson related that before the fire he left City Hall alone to walk in the vicinity to check doors of some businesses before going on car patrol. He returned to the jail (City Hall) briefly and then went on patrol (Tr. 108, 109, 116, 117 & 119). He returned later when he saw the fire in town and heard the whistle (Tr. 110). This officer first estimated at trial that the fire started around 1:00 a.m., but cross-examination places his estimation at ten minutes until 1:00 a. m. (Tr. 116, 121, 122 and 123). Police Chief Vernon Rucker confirmed that the fire began between quarter til one or 1:00 o'clock (Tr. 10). The placement of Maddox and Smither at the scene of the crime was accomplished by the Commonwealth

through two "perceptive" witnesses, Shirley Cole Smith and Robert Shedd, both of whom were in jail at the time (Tr. 3, 107, 245, 247, 248 and 308). Shirley Cole Smith was in jail on a charge of murder, for which she was eventually convicted of manslaughter for killing a member of the Way family, namely, Charles Way (Tr. 302 & 324). Mr. Shedd, an uneducated negro, thirty years of age, was in jail on the morning in question for stealing (Tr. 2, 14 & 244).

As will be seen more fully, the jail inmates attribute the cause of the fire to an explosion at the front door, the arson investigators called by the Commonwealth at trial attributed the cause to the ignition of inflammable liquids, and Commonwealth witnesses, David and Pamela Bright, gave a varying account.

The jail area from which eye witnesses Robert Shedd and Shirley Cole Smith viewed the event was located behind a concrete wall at the rear of the long hallway in the police station. Prior to the remodeling of the City Hall which took place soon before the fire two fire trucks had been parked in the hallway (Tr. 34 & 622). Immediately prior to the fire a new office for the Chief of Police and a radio room had been constructed along the left wall of the hall (Tr. 37, 11, Pl. Exhibit 6 & Pl. Exhibit 12). Mr. Shedd's line of vision from the men's section of the jail would have been through a window in the jail and down a hallway to the right of the offices. On a diagram used by the Commonwealth during direct examination of Shedd, plaintiff Exhibit 12, to which appellants had objected at trial, the distance from Shedd's window to the front door was over 45 feet.

But, the Police Chief Vernon Rucker estimated the distance to be 120 feet (Tr. 589). Mr. Shedd himself made an estimate of the distance and Chief Rucker, in repudiating his own estimate, at least states that Shedd's estimate of the distance was wrong (Tr. 590, 597 & 598). The other eye witness, Shirley Cole Smith, was in an adjacent section of the cell separated physically and visually from Shedd by a cell door (Tr. 304). In the common wall which separated the jail area from the hall and office area was another window on the women's side of the jail (Pl. Exhibit 6). Shirley Cole Smith could not see the front door of City Hall which opened onto the street, nor could she see the radio room or the office of the Chief of Police. Partitions had her view blocked (Tr. 76, 78, 84 & Pl. Exhibits 6, 11 & 12). Commonwealth witness, Chief Vernon Rucker, explained that one would have to be in behind or close behind his office to be seen from Shirley's side of the jail (Tr. 27, 79 & 84).

There were *two* windows through which Shirley must have looked into the hall area. She had no access to the window parallel to Shedd's onto the main hallway. Back from the wall separating the jail and the hall was another window in the women's cell itself, the two windows being separated by an inaccessible walkway with a width of 2½ feet to 4 feet (Tr. 95 & 306). Further limiting her vision was a metal plate on the cell window creating only rectangular slots at the bottom and the top through which one could see (Tr. 90, 95 & 96). Shirley denied that this blocked her vision (Tr. 305).

More interestingly—Shirley Cole Smith was an eye witness with only one eye (Tr. 305).

Robert Shedd unfolded his story to the jury: On the confusing occasion he described sounds of glass breaking and yelling and screaming from the inmate in the other section, Shirley Cole Smith. There were also some shots fired at the jail door (Tr. 242 & 251). Shedd witnessed the events from his window that contained bars and two layers of mesh screen (Tr. 89, 100 & 269). He related in his direct testimony for the Commonwealth that he saw appellant, C. W. Maddox, throw something in the floor at the front door which "blowed" up (Tr. 246, 248 & 278). Shedd told of a light being shot out and the darkening of the hallway and *then* hs saw the Smither boy go out the door. The only time he saw Smither was when he was going out the door (Tr. 245 & 251).

On cross examination Mr. Shedd said that he could see with the light out on the street and that he saw Smither as he was turned "kind of side ways" (Tr. 274 & 277). Mr. Shedd admitted to the jury that he did not know who Smither was but saw him later on the street and reported this identity to Chief Rucker (Tr. 247 & 248).

The impossibility of Shedd's identification of Smither was shown on his direct examination when he placed an "S" on Pl. Exhibit 12 at the location where he saw this appellant (Tr. 250). This marking on the exhibit shows that the point at which Smither was located was outside the line of vision of the witness be-

cause of the projection of office walls between Shedd's window and the front door.

Although Shedd said that he could see clearly to identify appellants, he could not see what they had in their hands, nor did he see a gun responsible for the "shots" described by him (Tr. 272 & 273).

Neither man seen by Robert Shedd talked therefore there was no voice identification for the benefit of the jury (Tr. 296).

The "explosion" attributed to appellant Maddox was so powerful at the front door that it shook the concrete building hard enough to knock Shedd down behind the jail wall (Tr. 290). This fact was corroborated by the other identification witness for the Commonwealth, inmate Shirley Cole Smith. She compared the explosion to dynamite and it was claimed to have knocked her from her bed (Tr. 313).

[It will be developed in argument how well the portions of the building close to the explosion point survived the impact.]

Shirley Cole Smith did her part to incriminate the appellants. Since the appellants would have had to step directly in front of the outside window to the women's section of the jail to be identified by Shirley, she testified that this was done (Tr. 311 & 314). There was no apparent reason for appellants to appear in the area behind the offices directly in view of Shirley Cole Smith; after all, the fire did not originate near the back of the hall and no burn pattern was indicated in front of the women's lockup (Tr. 193, 198, 216 & Pl. Exhibit 11). If appellants appeared to the view

of Shirley Smith, why did she not see them do anything that caused the noise or explosion? Mr. Shedd, who had the clearest view, said nothing at trial about either of the appellants coming back near the jail windows. To the contrary he did say specifically in his earlier testimony to a Grand Jury that he did *not* see the men come back towards the window (Grand Jury Tr. of January 15, 1975, p. 10).

No mention was made by either eye witness that either appellant attempted to mask identity, despite the fact that there was yelling in the jail section disclosing the presence of witnesses.

Preceding the testimony of the eye witnesses at trial, the Commonwealth produced two arson experts who were directly opposite Shedd and Smith as to the cause of the fire: Kenneth Wood, Arson Investigator with the Bureau of State Police stated expressly that the origin or cause of the fire was "inflammable liquid or material was used inside the building and then ignited" (Tr. 188). According to Wood, referring to Pl. Exhibit 11 showing burn patterns, the original ignition point was at the front door (Tr. 192). The other state police arson investigator was Lowell Hamilton who refuted the "explosion" theory of the eye witnesses. On the basis of the burn patterns, Mr. Hamilton discounted the possibility that an explosion at the front door could have caused the fire in question with the answer to a question on cross-examination: "No, not with throwing a fire bomb in the front of the building with the distance of that thing there you wouldn't

have a burn pattern in the rear of the building. We do have" (Tr. 220).

Lowell Hamilton is hard to disbelieve. He said he has been 100% correct in the cases that he has testified about (Tr. 221).

Both investigators, Wood and Hamilton, concurred that the accelerant used to start the fire in City Hall was some sort of fluid which was ignited (Tr. 188 and 194). Hamilton said that a liquid petroleum was distributed which was ignited (Tr. 215). Such a substance was confirmed by Commonwealth witness Barry Marston, a State Police chemist who submitted a report to the effect that petroleum hydrocarbons were used (Tr. 234, 235 & Pl. Exhibit 28).

As appears in subsequent argument, neither eye witness saw or smelled anything to support the idea that liquid petroleum products were spread and ignited.

Likewise, as further appears in argument, Officer Peterson who returned to City Hall, testified about observations directly contradicting the explosion or the petroleum origin of the fire.

The destruction of the apartment dwelling of David and Pamela Bright, directly above City Hall, predicated an indictment against each of the appellants. Just before the fire Mr. and Mrs. Bright were asleep in the bedroom which would have been just above the front door of the police station (Tr. 157). David heard a popping sound—a succession of noises that were all the same (Tr. 147). He immediately went to the bottom of the stairs which exited right in front of the Police Station and he saw nothing. He returned

upstairs before he saw smoke, and the first thing he knew about the fire was the smoke in his apartment (Tr. 148, 157, 163 & Pl. Exhibit 1). Mrs. Bright associated the noise with the sound of a very loud electrical shock and thought it was a fuse box blowing, but it was not (Tr. 163, 167 & 170). Neither of the Brights heard prisoners hollering (Tr. 151 & 164).

Arson investigator Kenneth Wood did not check the fuse box to see if it had anything to do with the fire (Tr. 190).

Mysterious was the motive of appellants to go into the City Hall without disguise, commence an inferno, and go away leaving screaming people to die while property of the city burned. The Chief of Police, Vernon Rucker, had no trouble prior to the fire with C. W. Maddox even though Rucker had shot the brother of Mr. Maddox the previous month (Tr. 28 & 29). Rucker admitted that he could not testify that he considered the burning of the jail to be an effort on the part of C. W. Maddox to get even for that; he did not know what C. W.'s motive was (Tr. 67 & 68). Mr. Maddox had never made threats to Mr. Rucker nor had he done anything to his property, or property possessed by him, since the shooting of the brother (Tr. 400).

The motives of the eye witnesses earn scrutiny. Robert Shedd had to testify in the presence of Police Chief Vernon Rucker who had had Mr. Shedd in jail several times before the date of the fire. Attorneys for appellants requested that Mr. Rucker be separated from the courtroom along with other witnesses, which

motion was overruled (Tr. 7, 239 & 240). Nevertheless, Mr. Shedd was released from custody on his larceny charge on the morning of the fire upon the decision of Chief Vernon Rucker after some questioning took place (Tr. 14, 42, 43 & 50). His eventual fine for the larceny of the radios was $45.00, a fine comparable to his fines for disorderly conduct and drunken charges (Tr. 14 & 58). Shedd denied that he was promised anything for his testimony (Tr. 256).

Witness Shedd told the jury that he knew of no reason why Maddox or Smither would want to hurt him. He had had no trouble with either of them before the fire (Tr. 297 & 298). During the interrogation sessions immediatley after the fire Shedd told Police Chief Rucker and Detective Hamilton that he did not see anybody and that he did not know who set the fire (Tr. 42 & 48). Detective Hamilton explained that he and officer Estis talked to the inmates and that Shedd told him that he wasn't sure of the identification of Maddox (Tr. 225 & 226). Yet, by the time the January, 1975, Grand Jury session arrived Shedd identified C. W. Maddox, which he reiterated at trial, maintaining that he did not tell earlier because he was scared (Grand Jury Transcript, January 15, 1975; Tr. Transcript 256). Eye witness Shirley Cole Smith in her written statement of April 18, 1975, disclosed that Shedd said that he saw nothing except two men that he did not recognize but that Shedd later changed his mind after he talked to the investigators out of the presence of Shirley (Def. Exhibit 1). Shirley later recanted that written statement by another one dated

June 11, 1975 (Pl. Exhibit 29). Shedd added at trial that Maddox threatened him since the trial, but such threat did not come directly; it was hearsay through another person (Tr. 260). The motive for the testimony of Shirley Cole Smith is equally suspect. After the fire she did not identify Maddox or Smither to Detective Hamilton. She mentioned Donnie Way (Tr. 227). At the January, 1975, Grand Jury session Shirley Cole Smith testified under oath that she did not see any of the people that were in the jail on the night in question (Grand Jury Transcript, January, 1975, pp. 22 & 23; Tr. Transcript 325 & 326). This was consistent with Shirley's written statement of April 18, 1975 (Def. Exhibit 1). That statement made mention of identifications pointing to brothers of Charles Way as the perpetrators of the crime (Tr. 607, *et seq.*). (One should recall that Charles Way was the man killed by Shirley Cole Smith.) In May, 1975, Shirley was convicted of manslaughter for the death of Charles Way (Tr. 302 & 321). At the trial of the instant case against Maddox and Smither Mrs. Smith professed not to remember the statement that she signed of April 18, 1975 (Tr. 331). Subsequent to her own conviction she gave another written statement dated June 11, 1975, to Commonwealth investigators when they visited her at K.C.I.W. Correctional Institution for Women (Pl. Exhibit 29; Tr. 335). This statement was at odds with her Grand Jury testimony and her previous account. This last statement (Pl. Exhibit 29) implicated Mr. Maddox and Mr. Smither. Shirley admitted candidly at the Maddox-Smither trial

that she was looking forward to her parole consideration coming up in July of 1976 (Tr. 321). There was no evidence that Maddox or Smither had any grudge against Shirley Cole Smith at the time of the fire however. It could not be said that Mr. Maddox was offended by the shooting of Charles Way by Shirley Cole Smith. As a matter of fact, Mr. Maddox did not get along well at all with at least one member of that family, Donnie Way (Tr. 399).

At the conclusion of the Commonwealth's proof counsel for appellants made the appropriate motion for quashing the indictments and dismissal of the charges which motion was renewed at the conclusion of all the evidence (Tr. 340 & 626). The motions were overruled.

The evidence of appellants supported their alibi.

Appellant C. W. Maddox was 33 years of age at the time of trial, a resident of Henry County, Kentucky, for twelve or thirteen years and generally employed as a truck driver. Robert (Bobby Gene) Smither was 25 years of age, a resident of nearby Oldham County for four or five years.

Mr. Maddox had been married before and was the father of a five year old child with whom he regularly exercised visitation privileges. These two men were friends and lived together during the month of December, 1974. On December 23, 1974, Maddox lived with Larry Brent in a rented trailer about one and one-half miles from the City of Eminence (Tr. 353, 354, 355, 357, 403, 404 & 449).

The appellants left their friends at the trailer and went after some beer on the evening preceding the fire, driving the black Chevrolet of Mr. Maddox (Tr. 356 & 358). They were alone during the time of the search for refreshment and when they arrived back at the trailer the friends were still there (Tr. 358 & 440). The stirring cross-examination of the appellants at trial revealed some confusion as to the times certain stops were made before appellants returned to the trailer, but the end result was that Mr. Maddox estimates that it was about 11:45 p. m., when he and Smither returned although he did not remember exactly (Tr. 357, 359, 381 & 382). Mr. Smither at first testified that the return to the trailer was about 12:30 a. m., on the morning of the fire but then he changed his mind in order to be consistent with a previous written statement and set the time at 11:30 p. m., on December 22, 1974 (Tr. 411, 420, 436 & 437). In any event, they were together at the trailer with other persons after 12:30 a. m., on December 23rd. The fire began between quarter til one and 1:00 a. m.

It was certain that appellants were at the trailer between 12:45 and 1:00 a. m.—the time during which the fire occurred. Larry Brent and his companion, Donna Sanders, were the last two of the group to leave Maddox and Smither at the trailer and when Brent looked at the clock it was "quarter to one." After that he sat in the car for a few minutes with Donna, returned to use the restroom, and departed for town at about five til one and arrived at one o'clock (Tr. 453, 455 & 457). Highway 22 is the route directly to

Eminence from the trailer (Tr. 357). The black car of Mr. Maddox was at the trailer when Brent departed and no vehicle overtook Brent's car on the way to town (Tr. 457 & 458). The time of arrival of Brent and Donna Sanders at Eminence (1:00 a. m.) was confirmed by Miss Sanders (Tr. 493).

Both appellants deny setting the fire and neither man had been in the buildings in question on the evening of the fire nor had they passed closely by (Tr. 361, 362, 415 & 416).

Officer Tommy Peterson, who was on patrol, knew that Maddox drove a black Chevrolet and he did not see that Chevrolet while he was on patrol that evening nor did he see Mr. Maddox or Mr. Smither personally even though he was in the vicinity of the jail building in a matter of minutes before the fire started (Tr. 123 & 124). It is important that one Elmer Baker reported to Chief Vernon Rucker that on the evening of the fire he saw a *white* car leaving town at a high rate of speed (Tr. 32 & 33). As concerns the testimony of the arson investigators of a petroleum product fire, Larry Brent, upon return to the trailer during the time the fire was in progress, noticed no aroma which would indicate the presence of gasoline or kerosene on the appellants or their clothing (Tr. 460, 461 & 464).

C. W. Maddox nor Bobby Smither had even threatened Robert Shedd, Shirley Cole Smith or their families. Although Rucker had shot C. W.'s brother, there were no threats by C. W. to Mr. Rucker and

Smither had never had trouble with Rucker (Tr. 395, 396, 400, 416 & 417).

C. W. Maddox could not earn the chance to free himself after his arrest for this crime. Police Chief Vernon Rucker let Mr. Maddox out of jail to see if he could find the guilty party within three days (Tr. 76).

ARGUMENT

I

The Evidence Produced by the Commonwealth Was Insufficient to Submit to the Jury and as a Matter of Law There Was Reasonable Doubt Warranting a Directed Verdict of Acquittal.

Rarely do courts substitute their judicial power for the fact-finding prerogative of juries, but this is a case where it should have been done. The totality of the proof of the Commonwealth created so much "reasonable doubt" as to warrant the intervention of the Court to prevent gross injustice. The conflicts relating to the manner in which the fire occurred, and the doubt surrounding the identifications of appellants by the eye witnesses, lead to the conclusion that corpus delicti simply was not proved to the requisite degree.

Either Shirley Cole Smith or Robert Shedd committed perjury or all of the Commonwealth's witnesses that preceded them at trial perjured or were manifestly mistaken. Mrs. Smith had every reason to be untruthful: in hope of a favorable consideration of authorities on her parole situation, or perhaps in response from threats from members of the family of

Charles Way, her manslaughter victim. Mr. Shedd's motive to bend the truth was obvious: he could use favorable treatment from the authorities that constantly govern his liberty. As a matter of fact reward came early for him since he was released immediately after intensive questioning by investigating officers and subsequently paid a fine for larceny that equalled that for drunken charges (Tr. 624). Both of these witnesses had previously given different accounts which failed to incriminate Maddox and Smither.

The evil of the testimony of Mr. Shedd and Mrs. Smith gleams in the light of logic. Shedd placed the origin of the fire at the front door where he claims that he saw appellant Maddox throw an exploding object. Maddox was within the building at the time, supposedly within Shedd's line of vision at the end of a long dark hallway (Tr. 248, 277 & Pl. Exhibit 12). From the frontal view of the building Mr. Maddox would have thus been to the right of the front door. The eye witnesses were both coordinated on the point that the explosion was so powerful as to knock them down within their cells at the end of the hallway and behind a concrete wall. The jail and hallway had a concrete floor (Tr. 290, 313 & Pl. Exhibit 12).

The question is, did an explosion of such force occur at the hand of C. W. Maddox? Incredible. Consider:

> (a) Maddox would have been destroyed with an explosion of such force just a few inches away from him. No reasonable person would have thrown an exploding or inflammable object at his own exit!

(b) Arson expert for the Commonwealth, Lowell Hamilton, said that a bomb at the front door would not have created the burn patterns described by the arson investigators (Tr. 220).

(c) The windows, a few inches or feet from the explosion site, would have been blown out. Yet, Officer Peterson saw these windows popping out from heat after he returned to the fire upon hearing the fire alarm. Defense witness Carroll Payton confirmed that the windows were just popping out when he arrived at the fire (Tr. 539-540; 553; 111; 125; 126 & Pl. Exhibits 1 & 11 for position of doors). The window in the jail, covered with mesh screen, through which Mr. Shedd performed his visual feats, was not damaged (Tr. 88 & 89).

(d) If an explosion occurred, David Bright, the tenant directly upstairs, would have seen something when he walked to the street just beside the front windows of the narrow City Hall building. Yet he obviously saw no windows blown out and the doors were not blown away. He did not see a fire (Tr. 148). Moreover, he and his wife were not knocked from their bed which was located directly above the alleged explosion point.

(e) An explosion at the front door would have been directly in front of the radio room, which would have been blown away. But that room was an identifiable structure when Officer Peterson, during the fire, attempted to release the prisoners by walking down the hallway past the radio room. That officer described the fire as being in that room (Tr. 127).

Turning now to the proposition advanced by the Commonwealth's arson investigators that a petroleum product was spread and then ignited. Conveniently the

experts placed the origin of the fire at the front door (Pl. Exhibit 11). A fire caused by fluids not only conflicts with the eye witness account but has other unreasonable aspects. Analyze:

(a) Neither "eye witness" saw anybody spreading a fluid. Shedd saw no one light a match nor was Maddox holding a burning object before throwing it on the floor (Tr. 292 & 292). Moreover, Shedd smelled no gasoline or kerosene prior to the fire (Tr. 299). Shirley Smith testified as to nothing which would indicate the presence of a petroleum product. Yet, Shedd was so watchful that he could see the profile of appellant Smither at the end of the dark hallway from an outside light.

(b) Officer Peterson, who arrived after the fire began, smelled no gasoline (Tr. 131).

(c) Appellant Maddox would have surely died or sustained injury had he thrown an igniting bomb after spreading inflammable fluid in the very room where he stood, especially at his exit. Arson investigator Lowell Hamilton would not advise of such a stunt (Tr. 228).

(d) Officer Peterson, upon arrival at the fire, walked down the very hallway in which a large burn pattern was described by the arson expert! And, he walked through the front door! (Pl. Exhibit 11). There was no fire in the hallway (Tr. 127, 128 & 130). Officer Peterson flatly stated: "The only fire I saw when I went into the building was right in the radio room in the office there" (Tr. 114).

(e) A petroleum fluid fire was not corroborated by David Bright, the Commonwealth witness who came to the street right in front of the building and saw nothing.

Other contradictions characterize the testimony of the eye witnesses. Although somebody shot at the door (Tr. 270) and there was other evidence of gun shots, no witness saw guns.

The only reasonable conclusion of all of this is that there was no bomb nor was there a petroleum fluid ignition that started the fire. The only real "perceptive" witnesses for the Commonwealth were Officer Peterson and Mr. and Mrs. Bright. Officer Peterson *did* go into that building after the fire started and his testimony repudiates the explosion at the front door as well as the petroleum fire there. The Brights heard nor saw anything corresponding to the testimony of Shedd, Smith or the arson experts. Perhaps there was a fire in the radio room, as Peterson described, which caused loud popping noises similar to electrical shocks as described by Mrs. Bright.

The Commonwealth fell victim to "over-proof." Too many witnesses were called and a reasonable doubt was therefore created as a matter of law.

As to the proof of the appellants, it is unreasonable for a jury to say that they were not telling the truth on the essential question of whether they started a fire. The culprits, if any, would have had to watch the City Hall when Officer Peterson departed and then make a timely move. Appellants had not such time to dedicate: they were at the trailer at the time of the fire according to sound defense witnesses who had no reason to perjure themselves. Officer Peterson placed the time of the fire at about ten til one a.m. Appellants were at the trailer and the automobile of Maddox was not

seen in town. The probative value of the alibi witnesses, and the speculative situation created by the Commonwealth's witnesses, was such as to so impair the testimony of the jail inmates that no reasonable person could conclude that these appellants were guilty beyond a reasonable doubt.

Even if time permitted appellants to go to town, why would these sober men, without disguise, attempt murder of known occupants of buildings for the sole satisfaction of burning some city owned office spaces.

There is authority in Kentucky's decisional and statutory law to support a directed verdict of acquittal.

In *Stone* v. *Commonwealth* Ky„ 456 S. W. 2d 43 (1970), the Court of Appeals intervened to prevent injustice even though the reversible error was not raised by appellant on appeal. In *Stone* a witness specifically testified that a stolen payroll check was cashed at his place of business by the defendant on a certain day and at a certain time. The defendant proved that he was not in the place of business on the date (s) in question. The Court reversed on the basis that the date of the bank stamp on the back of the check repudiated the testimony of witness Brogan. The testimony of this only witness was characterized as erroneous by the High Court and the other fact (date of bank stamp) "so seriously affects the credibility of Brogan's testimony that we feel that the verdict should not stand." This bold move of the Court of Appeals in *Stone* was supported by citing with favor *Davis* v. *Commonwealth,* 290 Ky. 745, 162 S. W. 2d 778 (1943), and RCr 9.26, RCr 13.04 and CR 61.02.

In *Davis* the Court of Appeals went beyond the testimony of an eye witness to reverse. A businessman identified Davis as the man who passed the forged check and there was another more equivocating witness who confirmed the identification. The defendant himself put on strong alibi testimony. The Court emphasized at page 779 of the decision that the honesty or sincerity of the prosecution witnesses were not questioned but that it was easy to make a mistake in identity, particularly where there was only casual observation. But the verdict was against the weight of the evidence. The rule adopted by the Davis court was that: "It is deemed in our rule better that many guilty persons escape then one innocent person should suffer. . . ." On page 780 the Court stated:

> "(8) An appellate court ought to be sensitive to the realities, and if it believes that there may have been a miscarriage of justice it should use its extraordinary power and reverse a judgment that there may be a fuller development of facts so that the guilt of the accused, if he is guilty, may be more certainly determined."

The convictions of Maddox and Smither in the present case rested solely on eye witnesses whose testimony was extremely suspect. Neither witness was detached, both being under total control of law enforcement officials. Both witnesses were viewing in excitable circumstances and into a poorly lighted hallway. Shirley Smith's view was with one eye, she probably crouching on the bed as she looked through a crack behind an iron plate over a window. Shedd gazed through screens

and bars to identify men with light from the street into the long hallway. These witnesses did not see performed certain acts which allegedly made the sounds, nor did they see other important events which supposedly caused the fire. Moreover, these persons previously gave conflicting accounts on identification right after the fire when there was no reason to fear reprisal.

Identifications provided by prosecution witnesses were given very little weight in the case of *Fyffe* v. *Commonwealth,* 301 Ky. 165, 190 S. W. 2d 674 (1945).

The alibi witnesses in the instant case were strong, positive, and of good quality. The strength of alibi testimony can operate to take the case from the jury especially where countervailing testimony lacks credibility. *Fry* v. *Commonwealth,* 259 Ky. 337, 82 S. W. 2d 431 (1935) is illustrative. Defendant was convicted of bank robbery, with a verdict of life imprisonment. Many witnesses testified that the defendant, a pharmacist, was the person seen robbing the bank. Some of these witnesses were unequivocal. By contrast, defendant Fry produced numerous alibi witnesses—upstanding citizens of his county, including professional men, who placed him far from the crime during the time it was committed. The Court of Appeals reversed, flatly choosing the alibi witnesses over those of the prosecution. The Court *compared* the witnesses with the circumstances under which the identifications were made, with attention to the observations made under the tenseness of excitability. The decision was tanta-

mount to a finding, as a matter of law, of "mistaken identity" on the part of Commonwealth witnesses.

A jury cannot be allowed to surmise in order to convict. A jury cannot speculate with the liberty of one who although accused is presumed to be innocent until the contrary is shown beyond a reasonable doubt. *Fleenor* v. *Commonwealth,* 311 Ky. 109, 223 S. W. 2d 587 (1949).

The patently erroneous testimony of Shedd and Smith should be cast out with a reversal with an instruction to acquit.

RCr 9.26 pertains: Substantial error. A conviction shall be set aside on motion in the trial court, or the judgment reversed on judgment on appeal, for an error or defect when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced.

II

Appellants Were Denied a Fair Trial and Their Fundamental Rights Were Violated When They Were Tried on Multiple Indictments Arising Out of One Alleged Act of Arson, and It Was Error to Instruct the Jury and to Render Sentences in Such a Way as to Compound the Punishment.

Over objection of counsel for appellants each of these men were tried in the Henry Circuit Court on three separate indictments. Motion was made to quash the indictments and the instructions were objected to because of multiplicity (Tr. 340, 341, 348, 349 & 627). At the sentencing stage of the case appellants made

timely protest of the consecutive sentences rendered by the Court based upon the jury verdicts (New Trial and Sentencing Transcript, pp. 46 & 54).

Each appellant was found guilty and sentenced upon each indictment.

The only evidence connecting the appellants with the cause of the fire in Eminence was the testimony of Robert Shedd who said he saw C. W. Maddox throw an object which exploded. At most then, there was but a single act of arson which resulted in the burning of structures which were, in effect, a part of the same building.

Court have found it offensive to stack punishments where there has been only a single event. Some of these cases involved interpretations of statutes. For example, in *Ladner* v. *United States of America,* 358 U. S. 169, 3 L. Ed. 2d 199, 79 S. Ct. 209 (1958), the Supreme Court of the United States reversed lower court decisions which had upheld a second and consecutive sentence imposed on conviction for the wounding of two federal officers from a single shotgun blast. The petitioner contended that he was guilty of but one "assault" within the meaning of the applicable federal statute and was thus subject to only one punishment. The lower courts held that the wounding of two officers constituted the separate offenses. There was no constitutional issue involved, just a construction of a federal statute. In ruling that an act of assault can only be one offense even though it has impact on two officers, the Court stated from page 205 of the decision in 3 L. Ed. 2d 199:

> "Moreover, an interpretation that there are as many assaults committed as there are officers affected would produce incongruous results. Punishments totally disproportionate to the act of assault could be imposed because it will often be the case that the number of officers affected will have little bearing upon the seriousness of the criminal act."

The Supreme Court in *Ladner* adopted a policy of *lenity.*

In *Prince* v. *United States,* 352 U. S. 322, 1 L. Ed. 2d 370, 77 S. Ct. 403 (1957) the defendant was charged and convicted on two separate facets of a bank robbery offense. The Supreme Court interpreted this situation in such a way as to avoid compounding the sentences and the case was reversed.

The lenity view of *Ladner, supra,* has carried forward into Kentucky in the decision of *Commonwealth* v. *Colonial Stores, Incorporated,* Ky., 350 S. W. 2d 465 (1961) where defendant was indicted on 416 separate indictments for the offering for sale of separately wrapped packages of meat, each weighing less than the weight stamped thereon. The Court, in searching for legislative intent, analyzed the various types of cases for a basic theory or rule for determining when there is only one offense and when there are multiple offenses, and it was concluded that the grounds of distinction in the cases are obscure. The Court decided that there was only one offense for the total quantity of the particular commodity offered for sale at one time. To construe otherwise the maximum fines would have been $41,600.00 and imprisonment for 68 years. This 1961

decision adopted the construction of *Ladner* in favor of lenity to avoid extremely harsh or incongruous results as to punishments.

By comparison, Maddox and Smither at most committed one act; in the *Colonial Stores* case there were separate acts of wrapping 416 packages with potential harm to 416 customers.

There is enough latitude in the penalty clause of one arson statute under which Maddox and Smither was convicted to sufficiently punish without stacking the indictments. If our present case were to become the rule, one act of arson burning of a storehouse worth millions of dollars would carry less penalty than the burning with one fire two small stores attached to one another constituting "separate buildings" or, one small fire set to burn an office in an apartment building could well result in fifty indictments, one for each dwelling.

It is respectfully urged that Maddox and Smither be treated in a way consistent with the new Kentucky Penal Code which became effective after the date of the fire in this case. Under the present KRS 513.010 dealing with arson, in the definitions (subsection (2)) it is provided that where a building consists of two or more units separately secured or occupied, each unit *shall not* be deemed a separate building.

The Chat 'N' Nibble Restaurant, the apartment of the Brights over City Hall, and the Western Auto Store, was in fact one building with the units separated by walls. The varying uses of the units should not expose appellants to compounded punishments.

There was an early Kentucky case cited by the Commonwealth at the trial on this principal question, *Combs* v. *Commonwealth,* 93 Ky. 313, 20 S. W. 221 (1892). Defendants there were indicted for burning a dwelling of one Gibson, which burning was effected by the firing of a school house nearby. The Court of Appeals charged the defendant with the presumption to intend the natural consequences of his act. However this early case falls short of explaining whether defendants there were indicted for burning both the school and the dwelling.

There is a resemblance in our case to the double jeopardy cases. See Kentucky Constitution, section 13. The Commonwealth should not be permitted to do indirectly that which cannot be done directly. Had Maddox and Smither been tried on one indictment, could they later have been tried on the others? Surely not. Conviction on all indictments required proof of the same facts. There was identity of offenses. 21 Am. Jur. 2d, *Criminal Law,* sec. 182 states: "One test of identity of offenses is whether the same evidence is required to prove them. * * * If there was one act, one intent, and one volition, and the defendant has been tried on a charge based on that act, intent, and volition, no subsequent charge can be based thereon, . . ."

The number of charges against appellants was dictated not by the number of crimes allegedly committed, but by the number of businesses or dwellings affected.

At section 184 of 21 Am. Jur. 2d, *Criminal Law:* "A single identical offense cannot be divided into two

offenses for which two separate punishments are imposed."

Honoring a plea of former jeopardy the court in *Arnett* v. *Commonwealth,* 270 Ky. 335, 109 S. W. 2d 795 (1937) said that the Commonwealth may not split a single act or transaction into two or more separate offenses. At page 796:

> "It is also the rule that, where several indictments charged the same person with separate and distinct offenses of the same kind, conviction or acquittal upon one is a bar to the prosecution upon the others, if the evidence for the Commonwealth in the first case covers the several separate acts."

In the instant case the trial of several indictments in a way which would have been double jeopardy if tried separately, and the rendition of consecutive sentences, did violence to the concept of "due process of law" guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." 21 Am. Jur. 2d, *Criminal Law,* sec. 220.

The Henry Circuit Court should have granted the motion to quash the indictments, or should have ordered that the sentences be served concurrently to cure the wrongdoing of compounded indictments and verdicts.

III

Inadmissible References by Commonwealth Witnesses to a Lie Detector Test Administered to One of the Two Eye-witnesses Resulted in Such Prejudice to Appellants as to Warrant a New Trial.

During the trial of this action Police Chief Vernon Rucker was inquired of upon cross-examination as to when and how C. W. Maddox became a suspect in this case. Rucker was asked: "And how did he become a suspect?" Rucker's answer warranted a mistrial: "Well, we talked to Shedd and Shedd denied seeing anybody and we put him on a polygraph test" (Tr. 53).

An objection was commenced and the Trial Court interrupted by saying "objection sustained." Argument of counsel followed this non-responsive answer during which counsel for appellants moved for a mistrial and the setting aside of the jury. After argument by the Commonwealth Attorney, the Court overruled the motion for mistrial.

The complaint of defendants to the Trial Court was that the results of the test were implied and the inference was that the taking of the test by Mr. Shedd was so revealing as to cause the investigators to focus on Maddox as a suspect. On motion of defense counsel, the jury was admonished not to consider the reference to taking of the polygraph as the results were not competent evidence (Tr. 53-56).

Then again during the cross-examination of Shedd himself, while being asked as to the sequence of events

during his custody after the fire, Shedd mentioned the polygraph! The question was: "Then what happened, Robert?" Answer: "Then they asked me would I take a lie-detectors test." Defense counsel expressed surprise to the answer and requested that the witness be instructed, which request the Trial Court ignored after the Commonwealth Attorney opined that there was no need for the admonition (Tr. 287 & 288).

Immediately thereafter, Shedd was asked why he told the investigating officer what he knew and he responded by saying "I had a lie-detector test" (Tr. 289).

Despite the assurance of the Commonwealth Attorney after the first reference to the polygraph that nothing else would be said about it (Tr. 55) *he mentioned the lie-detector in closing argument* (Tr. 668)!

The compounded effect of these testimony references and the closing argument was to plant in the minds of the jurors the fact that Shedd was telling the truth at trial and that his previous contradictory statements were untrue by virtue of the disclosures of the polygraph. The jury was told in effect that the lie-detector confirmed Shedd's trial testimony and it was therefore prejudicial error not to grant a mistrial.

Conley v. *Commonwealth,* 382 S. W. 2d 865 (1964), represents the law in Kentucky on the lie-detector: results of lie-detector tests are inadmissible. The *Conley* Court reversed because this rule was violated, even though the defendant in that case had agreed that the results could be introduced.

On the basis of *Conley*, there would be no advantage to the Commonwealth to argue in our present case that

defense counsel learned of the polygraph in "responsive" answers to questions on cross-examination. Even if this constituted a waiver of the objection, no such waiver could overcome the rationale of *Conley* which restricts admissibility even where agreement to the contrary.

Appellants would have been better served with a rule allowing polygraph results than to abide the evidence that came in the Trial Court. At least cross-examination of a polygraph operator may have softened the impact of the results. The force of the references by Chief Rucker and Mr. Shedd was enough to convince any reasonable juror that the lie-detector in this case brought out the absolute truth.

IV

The Henry Circuit Court Erred in the Distribution of Peremptory Challenges Under RCr 9.40 for Which a New Trial Should Have Been Granted the Appellants.

Appellants were tried jointly on the indictments. RCr 9.40 relating to peremptory challenges provides, in part, as follows:

> (1) If the offense charged is a felony, the Commonwealth is entitled to five peremptory challenges and the defendant or defendants jointly to fifteen peremptory challenges. . . .
>
> (2) If one or two additional jurors are called, the number of peremptory challenges allowed each side shall be increased by one.
>
> (3) If more than one defendant is being tried, the court may at its discretion allow additional peremptory challenges to each defendant.

On the assumption that a court has discretion under the above-stated rule to grant additional peremptory challenges, the Henry Circuit Court, over objection, allowed the Commonwealth nine peremptories and allowed Maddox and Smither a total of eighteen. Timely objection was made that the Commonwealth was granted fifty percent as many challenges as that afforded the co-defendants (Voir Dire Transcript, pp. 2-7). Eventually the Commonwealth exercised three peremptory challenges and the defendants exercised a total of thirteen (Voir Dire Transcript, p. 139). Further objection to the court's action was voiced in the motion for a new trial.

RCr 9.40 clearly establishes the ratio of Commonwealth peremptories to defense peremptories, which is 1:3. To alter that ratio to 1:2 was a distinct advantage to the Commonwealth and went far beyond the wording and scope of the Rule. Subsection (3) of the Rule permits the court to exercise its discretion by allowing additional peremptory challenges *to each defendant.* There was no authority to increase the peremptories for the Commonwealth except under subsection (2) of the Rule which would have permitted the state to have one more peremptory because fourteen jurors were to be selected for trial in this present case.

The importance of adhering to the literal language of the Rule is stressed in the case of *Hoskins* v. *Commonwealth,* Ky., 374 S. W. 2d 839 (1964) where the Court denied a contention of appellants for additional challenges with this cogent statement: "The simple answer to this is that the Rule does not so provide."

Cases from other jurisdictions, involving various statutes, have held that even though there is an increase in peremptory challenges for the defense by reason of defendants being jointly tried, this does not for that reason multiply or augment the challenges for the prosecution. The state elected to proceed against the defendants jointly and cannot complain that each defendant gets the benefit of the statute granting peremptory challenges. See 21 ALR 3d 725, 744, 745 & 746.

Our Rule 9.40 is designed to equate the rights of multiple defendants, not to enlarge the right of the Commonwealth.

It cannot be said that the decision of the Henry Circuit Judge was "harmless error" simply because all peremptory challenges were not utilized. The hindsight view that no harm was done does not reach the problem. In preparation for a jury trial a defense attorney is expected to pour over the list of prospective veniremen in detail. During voir dire an attorney is acutely cognizant of the number of peremptory challenges left for both sides of the case. Each decision to strike from a studied jury list is made with the challenge limitations in mind. To select a jury under the disadvantage of an increased ratio in favor of the Commonwealth is a prejudice not invited by RCr 9.40.

V

The Failure of the Trial Court to Exclude From Evidence Commonwealth Exhibit Number 12, as Hearsay, Constituted Substantial Error.

Commonwealth Exhibit Number 12 was a diagram introduced as substantive evidence through Commonwealth witness, Kenneth Wood, an arson investigator (Tr. 190). This diagram was used extensively throughout the trial and was referred to by the Commonwealth Attorney in his closing argument (Tr. 671 & 683).

The diagram in question purported to depict the juxtaposition of the offices and jail cells within the City Hall Building and precise measurements were indicated thereon. The importance of the diagram is manifest considering the critical inquiries about the visibility of the eye witnesses in this case.

Witness Wood testified that he made the diagram (Tr. 189). He told the prosecutor on direct examination that he arrived at the figures and the information and markings as to the wall and size of the room by measuring with a tape, together with Lowell Hamilton, the other arson investigator. Wood further testified that the diagram accurately reflected the way that he reconstructed the Eminence City Hall at the time of the fire (Tr. 189 & 201). However, Mr. Wood had never been in the City Hall or jail area since the rooms were reconstructed just prior to the fire, but he said that Police Chief Vernon Rucker told him the location of the offices in assisting in the preparation of Exhibit 12 (Tr. 198 & 199). Mr. Wood admittedly relied

upon what somebody else had told him in preparing the exhibit, but he claimed that the "lines" [office outlines] were visible (Tr. 199). However, when called upon to compare his Exhibit 12 to a photograph already in evidence, Exhibit 6, Mr. Wood conceded that there was a *discrepancy* relating to the size and location of the radio room (Tr. 200).

Counsel for appellants moved to strike from evidence Exhibit 12 on the grounds of hearsay since the exhibit was obviously incorrect. The Trial Court overruled the motion (Tr. 200 & 202). Once the diagram was in evidence it was used by the Commonwealth on the direct examination of eye witnesses Robert Shedd and Shirley Cole Smith who marked the location of appellants as to the rooms drawn on the diagram (Tr. 249, 309 & 310).

Since Kenneth Wood acknowledged that the source of some information in preparing the exhibit came from Chief Vernon Rucker, Mr. Rucker was called to the stand during defendant's proof and inquiry was made about Rucker's markings on Exhibit 6, on which Mr. Rucker had indicated the locations of the rooms. The Chief changed his testimony as to the size of the radio room which he had originally indicated to the jury in green ink on Exhibit 6, admitting that his designation on the photograph as to the size of the room was wrong (Tr. 583, 584 & 585). Important was the fact that Mr. Rucker said at trial that he *can't say definitely* how far out the radio room wall extended (Tr. 585, 586 & 587).

Then when presented with Exhibit 12 Vernon Rucker—the man who supposedly provided the information to Kenneth Wood—admitted that Exhibit 12 was wrong (Tr. 587, 588)! Worse yet, Mr. Rucker said that he didn't give Mr. Wood this information either (Tr. 588)!

After these comments counsel for appellants renewed the motion to exclude the Exhibit 12, which was overruled.

The Commonwealth recalled Vernon Rucker to discuss another point raised with Exhibit 12 and then Rucker flatly said that *he was not present when the arson man measured the building and made the diagram* (Tr. 598)!

That Exhibit 12 was hearsay is abundantly clear. Mr. Wood relied upon help from Lowell Hamilton and Vernon Rucker in the preparation of this exhibit. "Hearsay" has been defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person. 29 Am. Jur. 2d, *Evidence,* sec. 493. Section 498 of this Am. Jur. reference reminds that: "A statement objectionable as hearsay does not become competent by reducing it to writing."

Sometimes a writing or diagram can escape the hearsay objection. "When it is impracticable, however, to put before the court direct evidence on intricate points which have relevance, and there exists a document covering these points, such a document is admissible hearsay if a witness can be produced to

vouch for the general authenticity of such publication." 29 Am Jur. 2d, *Evidence,* sec. 834.

The Commonwealth in the instant case did not cure the hearsay objection. Lowell Hamilton, the other arson investigator who helped Mr. Wood with some measurements, provided no testimony at all respecting Exhibit 12. Vernon Rucker placed the kiss of death upon the exhibit by his uncertainty of the dimensions of the rooms and by his very denial that he supplied information to Kenneth Wood in preparation of the exhibit.

The exhibit was so highly relied upon by the Commonwealth that it should have been excluded. A similar situation existed in *Jackson* v. *Commonwealth,* 296 S. W. 2d 473 (1956). In that case Jackson was convicted of manslaughter and one of the grounds urged for reversal related to the testimony of a civil engineer who had prepared a map of the scene of the conflict and who testified concerning the location of certain physical objects, specifically, about the particulars of a driveway. The Court of Appeals agreed that the witness' statement was hearsay because he admitted that his opinion concerning the location of the property lines was based upon what other persons had told him. The Court said: "On another trial this character of evidence should not be admitted."

Incidentally, Exhibit 12 was incomplete in another respect. It did not show the window in the women's section over which the metal plate was placed, even though this diagram was used during the Common-

wealth direct questioning of Shirley Cole Smith (Tr. 309). The exhibit should have been excluded and it was prejudice not to do so.

VI

There Was a Prejudicial Abuse of Discretion by the Trial Court Under RCr 9.48 in the Refusal to Separate as a Witness Police Officer Vernon Rucker, Upon Timely Motion of Appellants to Invoke the Rule.

RCr 9.48 authorizes a judge to exclude from the trial any witness so that he may not hear the testimony of the other witnesses.

Admittedly, what witnesses will be excluded from the hearing of others lies within the sound discretion of the trial court. *Webster* v. *Commonwealth,* Ky., 508 S. W. 2d 33 (1974). The *Webster* decision also holds that a witness need not be considered an officer of the Court, within the meaning of this procedural rule merely because he is an officer of the law. If his presence is not required for the benefit of the court or assistance of counsel there is no reason for him to be regarded differently from any other witness.

At the trial counsel for appellants made timely motion for the exclusion of Police Chief Vernon Rucker from the courtroom (Voir Dire Tr. pp. 7 & 8). Again, prior to the testimony of an eye witness, Robert Shedd, this motion was renewed (Tr. 239 & 240).

There was no legitimate reason to permit the Chief of Police to remain in the courtroom during the testimony of the witnesses for the Commonwealth. By his

own words he minimized his role in the investigation of the case (Tr. 60). More importantly his "assistance" to the Commonwealth attorney could have been dispensed with during the testimony of Robert Shedd. The presence of the officer during Shedd's testimony was objectionable from the standpoint of the "schooling" which the officer would receive by hearing the witnesses testify, but more importantly because of the intimidating effect he would obviously have upon the witness Robert Shedd. Mr. Shedd was an uneducated black man who was continually under Mr. Rucker's power and control. Shedd had been in Mr. Rucker's jail several times (Tr. 14, 58 & 262) and there is no reason to believe that Shedd would be detached from further encounters with this Chief of Police. Moreover, Shedd had previously told differing stories as to the events of this case (Tr. 42, 49 & 226). Therefore, it should have been inferred from the circumstances that Shedd would be less inclined to give an objective recitation of the events supposedly witnessed by him in a trial where the influential police officer sat at the table with the Commonwealth Attorney exhibiting an obvious interest in prosecuting C. W. Maddox and Bobby Gene Smither.

The fair trial of these appellants having been adversely affected by failure to honor the motion to separate, reversible error was practiced.

VII

The Trial Court Abused Its Discretion by Setting Excessive Bail for the Appellants Pending Appeal of the Convictions.

After a hearing at which evidence was produced on the question of suitable bail on appeal the trial court entered an order on January 12, 1976, dated December 11, 1975, which retained the requirement of $75,000.00 bond for appellant Bobby Gene Smither and $99,000.00 bond for appellant C. W. Maddox. A separate notice of appeal was filed from this order. These amounts were excessive.

Section 17 of the Kentucky Constitution prohibits excessive bail. RCr 12.78 dealing with bail on appeal provides:

> 12.78 Bail on appeal.
>
> (1) Bail may be allowed by the trial judge pending appeal to the Court of Appeals in all cases except where the defendant has been sentenced to life imprisonment or death.
>
> (2) The applicable provisions governing bail shall apply to bail on appeal.
>
> (3) . . . .

Referring to the applicable provisions governing bail RCr 4.06 provides:

> 4.06 Amount of bail.
>
> If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the court will insure compliance with the terms of the bond, having regard to the ability of the defendant to give bail, the nature and circumstances of the

> evidence charged, the weight of the evidence against him, the character and reputation of the defendant and the probability of the defendant's complying with the terms of the bond.

A thorough discussion of the consideration affecting appropriate bail appears in the case of *Long* v. *Hamilton,* Ky., 467 S. W. 2d 139 (1971). This 1971 decision did not involve a question of bail on appeal, rather the proper amount of bail after indictment of a defendant who was charged for the penitentiary offenses of possession and sale of heroin. The trial court in *Long* fixed bail at $150,000.00. The evidence disclosed that defendant Long was a married man with a family; that he had lived the most of his life in Jefferson County; that he owned business property in Jefferson County, but had been unemployed for the past three years and that he had insufficient resources to post a large bond although he had $1,480.00 cash in his pocket when arrested. The trial court in *Long* was further aware that the defendant had a reputation of being the largest supplier of heroin in the east end of Louisville and his arrest record disclosed a series of arrests, a conviction for carrying a deadly weapon, and three other felony convictions on two of which he served two years each. Notwithstanding the history of the defendant, the Court of Appeals in *Long* held that the bail was an abuse of discretion and the judgment regarding same was reversed. The *Long* Court gave special emphasis to the provisions of RCr 4.06, pointing out that the trial court should regard the factors stated in the criminal rule only to the extent that they have a bearing upon the

likelihood that the defendant will flee from the jurisdiction of the court or that he will comply with the terms of the bond. At page 142 of the decision the Court observed that the amount of bond must not be fixed with a view toward punishing the prisoner and it was observed in the *Long* case that there was no evidence of intended flight or that the accused was a fugitive when arrested.

The Trial Court in this case was justified in taking a fresh look at the bail situation after the verdict of conviction. But, the basic considerations are still there, to-wit:

a. Both Maddox and Smither were residents of the vicinity of Henry County for years (Tr. 353, 404).

b. Appellant Maddox is the father of a five year old child (Tr. 354).

c. Although both men were temporarily unemployed, Maddox had been regularly employed as a truck driver. The arson charge against C. W. affected his employability (Tr. 395).

d. Neither appellant was a fugitive at the time of the arrests in this case, nor has there been any attempt to avoid an appearance at any stage of the proceedings, before or after conviction, despite an unfair reference in an order in this case which intimates that it was the appellants who were attempting to break out of the Henry County Jail (Indictment Packets, pp. 24, 25, 45, 39, 40 & 47).

e. Both appellants have invested in this case through employed counsel.

f. Neither appellant has been in the penitentiary nor was there any significant criminal history which would indicate that appellants would be a menace to the community (Tr. 393).

g. The weight and circumstances of the evidence against the appellants, as appears in the transcript of the trial, is so weak that appellants would have every expectation of a reversal on appeal.

h. That the bail set by the Trial Court is exorbitant and beyond the reach of the ability of appellants, is evidenced by the fact that appellants are still in the penitentiary.

The Court should find that the Henry Circuit Court set an excessive bail on appeal, and the same should be ordered reduced. In the event of a reversal granting a new trial, the Henry Circuit Court should be ordered to reduce bail. RCr 4.14.

CONCLUSION

On the basis of the foregoing appellants respectfully urge this Honorable Court to reverse the Henry Circuit Court and direct a dismissal of the case of the Commonwealth, quashing the indictments, for the reason that the evidence produced at the trial of this action was so insufficient as to create reasonable doubt as a matter of law. Alternatively, reversal is urged and appellants pray that a new trial be ordered.

Further, as to the appeal of appellants from the order setting bail, appellants pray for immediate relief

from the excessive amounts of bail required pending further proceedings before this Honorable Supreme Court of Kentucky or before the Henry Circuit Court.

Respectfully submitted,

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APPENDIX

KRS 433.010. Arson.—Any person who wilfully and maliciously sets fire to, burns or causes to be burned, or who aids, counsels or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof or belonging to or adjoining thereto, whether the property of himself or another shall be confined in the penitentiary for not less than two (2) nor more than twenty (20) years. (1167.)

KRS 433.020. Maliciously burning building other than a dwelling.—Any person who wilfully and maliciously sets fire to, burns or causes to be burned, or who aids, counsels or procures the burning of any barn, stable, garage or other building, whether the property of himself or another, that is not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or another; or any church, meeting-house, courthouse, workhouse, school, jail or other public building, or any public bridge shall be confined in the penitentiary for not less than one (1) nor more than ten (10) years. (1168.)